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Supreme Court of the United States.

OCTOBER TERM, 1941.

314-638

GEORGE H. MASON, TRUSTEE IN BANKRUPTCY OF WORCESTER MOTOR CO., INC.,
Petitioner,
v.
JOHN WYLDE ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS

AND

BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

The petition of George H. Mason, Trustee in Bankruptcy of Worcester Motor Co., Inc., and duly authorized to present such petition, respectfully shows:

Summary and Short Statement of Matter Involved.

This is an action originally brought in the Superior Court of Worcester County, Commonwealth of Massachusetts, by the petitioner, plaintiff therein and authorized to sue, to recover of the respondents, defendants therein, the value of

certain motor vehicles alleged to have been transferred by the bankrupt to the defendants within four months of the filing of the bankrupt's petition in bankruptcy at a time when the defendants or their agents had reasonable cause to believe that the Worcester Motor Co., Inc., was insolvent, and that the giving and receiving of the property aforementioned created a preference in their behalf as against the other creditors of the bankrupt wherein they received a greater percentage than the other creditors of the same class. The defendants' answer was a general denial (Record, p. 1). The case was referred to an auditor whose findings of fact were not to be final, and after the filing of his report (Record, pp. 1-6) the case was recommitted to the auditor for further findings, which appear in the auditor's supplementary report (Record, p. 11).

The auditor made specific findings of fact and found for the defendants generally. The facts are as follows:

The bankrupt until August 1, 1932, was engaged in the business of buying, selling and dealing with motor vehicles. The respondents advanced money to the bankrupt for the price of motor vehicles bought by the bankrupt and took back as security therefor so-called trust receipts covering the cars.

These "trust receipts" were found to be chattel mortgages in fact and were not recorded as required by the laws of the Commonwealth of Massachusetts (Record, p. 2).

> "Mortgages of personal property shall, within fifteen days from the date written in the mortgage, be recorded on the records of the town where the mortgagor resides when the mortgage is made, and on the records of the town where he then principally transacts his business. . . . The mortgage shall not be valid against a person other than the parties thereto until so recorded; and a record made subsequently to the time limited shall be void . . ." (G.L. (Ter. Ed.) c. 255, sec. 1).

The details and mechanics of these dealings are set forth in the record at pages 2 and 3.

Prior to July 20, 1932, the bankrupt had possession of new cars covered by such unrecorded "trust receipts" held by the respondents. On or about July 20, 1932, the respondents discovered that five of the new cars covered by "trust receipts" held by them were not on the bankrupt's premises. Payment for one of these cars was made by the bankrupt at that time and demand was made for payment for the other four cars, which were missing. However, the bankrupt stated it was low on funds, and "trust receipts" were then executed on eleven used cars as security in lieu of cash. The missing new cars at that time had been sold, or were under contract to be sold, to bona-fide purchasers, and all the claims of the respondents thereupon were surrendered (Record, pp. 3 and 4).

At the time of the execution of the trust receipts covering these eleven used cars, the respondents knew "that the bankrupt was low in funds, and needed what cash it had to meet its payroll; and had used some of the cash belonging to the defendants for that purpose" (Record, p. 5); "that the financial condition of the Worcester Motor Co., Inc. was poor, but not necessarily insolvent, though the [respondents] believed, and had a right to so believe, that further capital was going to be put into the business of the Worcester Motor Co., Inc." (Record, p. 5).

"On or about August 1, 1932, one of the directors of Worcester Motor Co., Inc. who had been expected to put more money into Worcester Motor Co., Inc., called an agent of the [respondents] saying in substance that no more money was going to be put into Worcester Motor Co., Inc. and that that corporation was going into bankruptcy; also instructing the defendant to come up and take the cars on which the eleven trust receipts were held" (Record, pp. 4-5).

Thereupon the respondents immediately repossessed the eleven used cars covered by the unrecorded trust receipts executed on July 20, 1932, and five new cars covered by unrecorded trust receipts executed prior thereto, and later sold the same (Record, p. 5).

At the time of this repossession the Worcester Motor Co., Inc., was insolvent, and the respondents knew or had reasonable grounds for believing that that was the fact (Record, p. 11).

On August 5, 1932, the Worcester Motor Co., Inc., was adjudicated bankrupt (Record, p. 2).

The plaintiff moved for judgment on the auditor's report and trial was had on the auditor's report and supplemental report as the only evidence (Record, p. 11). The defendants made requests for rulings upon which the trial judge endorsed: "I do not act upon the within requests." He "allowed" the plaintiff's motion for judgment and found for the plaintiff in the sum of $3291.76. The defendants excepted to the "refusal" of the judge to grant their requests for rulings and "to the final ruling and order" of the judge. The defendants then filed a bill of exceptions and the case was heard by the Supreme Judicial Court of the Commonwealth of Massachusetts (Record, pp. 12-14). In the opinion rendered by the Supreme Judicial Court, which appears in the record submitted herewith, the Supreme Judicial Court sustained the defendants' exceptions, disposed of all the questions involved in the case, and by rescript left nothing for the Superior Court to do but enter judgment for the defendants, which was done on March 17, 1941 (Record, pp. 15-30).

Jurisdiction.

Since this is an instance of a case brought by a trustee in bankruptcy to recover a preference and involves a question

of the application of United States Code, Title 11, section 96 (see Act of May 27, 1926, c. 406, sec. 14, 44 U.S. Sts. at Large, part 2, 666 (U.S.C. Sup. V)), and since the case cannot be properly decided on any independent ground of local law, it is submitted that, final judgment in said case having been entered on March 17, 1941, in the Superior Court, Worcester County, Commonwealth of Massachusetts, in accordance with the rescript of the Supreme Judicial Court (Record, p. 30), the jurisdiction of this Court to review said judgment is properly invoked under United States Code, Title 28, section 344 (b).

Question Presented.

The Supreme Judicial Court of Massachusetts in sustaining the defendants' exceptions to the Superior Court's entry of judgment for the plaintiff on the auditor's reports and in ordering the entry by the Superior Court of judgment for the defendants held—

That under the federal bankruptcy laws where a chattel mortgage is executed in Massachusetts within four months of the bankruptcy of the mortgagor and the recording of such mortgage is required within the meaning of U.S.C. Title 11, section 96 (see Act of May 27, 1926, c. 406, sec. 14, 44 U.S. Sts. at Large, part 2, 666), and the chattel mortgage is not recorded but possession is later taken of the chattels covered by the mortgage, the presence of the elements of a voidable preference is to be determined as of the date of the execution of the unrecorded chattel mortgage rather than as of the date of the taking possession thereunder.

The broad question of voidable preference was raised by the petitioner's declaration (Record, p. 1).

The narrow question of the date as of which the elements of a voidable preference are to be ascertained was raised by

the requests for rulings filed by the respondents (*cf.* particularly Nos. 15, 21, 25, Record, pp. 12-13), and the answer thereto formed the basis of the opinion and rescript of the Supreme Judicial Court (Record, pp. 24-28).

The judgment of the Superior Court should have been affirmed if, under the facts of this case, the proposition outlined above is not sound and in accordance with the established principles of law, and such is the question raised by this petition and presented to this Court for determination.

Reasons Relied on for Allowance of Writ.

Your petitioner respectfully shows to the Court that this is a case of great importance to your petitioner and others.

If the opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts is allowed to stand, cutting off as it does the power of the trustee in bankruptcy to protect the creditors by striking down unrecorded chattel mortgages in cases like the present, then the inevitable result will be non-compliance with the Massachusetts recording laws to the damage of subsequent creditors in the case of the ensuing bankruptcy of the debtor.

Had the creditor in the instant case recorded his chattel mortgage at the time he took possession, then the elements of a preference would have been determined as of this date and the trustee would have recovered. Hence, the obvious way to defeat the trustee is to keep the instrument off the record and then suddenly seize possession of the goods shortly before bankruptcy. That such dealings open wide the door for far-reaching fraud is patent.

Creditors will lend money, if at all, on the basis of property in the possession of the debtor and the lack of any chattel mortgage upon the record, only to have an unknown creditor spring up just prior to bankruptcy, armed with a

hidden chattel mortgage, and seize the very property which formed the basis for the creditors' lending money to the now bankrupt debtor. By the decision of the Supreme Judicial Court no remedy is left to the trustee in bankruptcy, who, if the mortgagee had complied with the recording statute just prior to bankruptcy, would have had a perfect remedy against the mortgagee. The opinion strikes, then, at the vitals of the debtor-creditor relationship.

This case is the first to be presented to this Court for determination in which the issue is raised of the date as of which the elements of a voidable preference are to be determined when possession is taken under an unrecorded chattel mortgage and in which both the execution of the chattel mortgage and the taking possession thereunder occurred within four months prior to bankruptcy.

Conclusion.

Wherefore your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Superior Court of Worcester County, Commonwealth of Massachusetts, to the end that the judgment entered in said case may be reviewed and reversed by this Honorable Court.

GEORGE H. MASON, Trustee in Bankruptcy
of Worcester Motor Company, Inc., *Petitioner*,
By JOSEPH TALAMO,
Counsel for Petitioner.

SAMUEL SEDER,
SAUL A. SEDER,
HAROLD SEDER,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1941.

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JOHN WYLDE ET ALS.,
Respondents.

BRIEF IN SUPPORT OF PETITION.

Opinions Below.

No opinion was filed by the Superior Court judge who found for the plaintiff (Record, p. 14). The opinion of the Supreme Judicial Court of Massachusetts, a copy of which is to be found in the record (page 15 *et seq.*), was handed down on February 24, 1941, and is printed in the Massachusetts Advance Sheets for the current year commencing at page 367 thereof.

Jurisdiction.

An action in a state court to recover a preference presents a federal question reviewable in the Supreme Court of the United States.

Rector v. *City Deposit Bank Company*, 200 U.S. 405.

Eau Claire National Bank v. *Jackman*, 204 U.S. 522.

Such an action is the present case (Record, p. 1). It is evident from the requests for rulings filed by the respondents (Record, pp. 12-13, *cf.* Nos. 15, 21, 25) and from the opinion of the Supreme Judicial Court that this federal question was the crux of the case and that the whole decision rests ultimately upon the answer to the same. Thus, the court said:

> "A primary question for determination is the date as of which the 'transfer' is to be judged in determining its voidable character" (Record, p. 25).

The court also said:

> "Since a finding was not warranted that the company was insolvent when it gave the 'trust receipts' on July 22, 1932, the plaintiff, the trustee in bankruptcy has failed to prove that the giving of the 'trust receipts' constituted a voidable preference" (Record, p. 29).

The petitioner, having in mind this federal question, invokes the jurisdiction of this Court to review the judgment of the Superior Court as ordered by the rescript of the Supreme Judicial Court, under United States Code, Title 28, section 344 (b).

Statement of the Case.

The case is stated in the petition (*ante*, pp. 1-4).

Specification of Errors.

The issue presented is stated in the petition (*ante*, pp. 5-6).

Summary of the Argument.

I. The prior cases before this Court cited by the Supreme Judicial Court in support of its conclusion on the issue

raised herein differ materially from the present case on their facts and do not control the decision in the present case.

II. The prior cases before this Court cited by the Supreme Judicial Court of Massachusetts in support of its conclusion on the issue raised herein were based on the federal bankruptcy act as it existed prior to the amendment of 1910, and therefore, on the decided cases, the case can be decided in favor of the petitioner.

III. In view of the policy behind the provisions of the bankruptcy act as evidenced by the trend of amendments thereto and the dictates of sound policy, the case should be decided in favor of the petitioner and the secret lien in the form of an unrecorded chattel mortgage declared a voidable preference.

Argument.

I.

THE PRIOR CASES BEFORE THIS COURT CITED BY THE SUPREME JUDICIAL COURT IN SUPPORT OF ITS CONCLUSION ON THE ISSUE RAISED HEREIN DIFFER MATERIALLY FROM THE PRESENT CASE ON THEIR FACTS AND DO NOT CONTROL THE DECISION IN THE PRESENT CASE.

The cases which were cited by the Supreme Judicial Court of Massachusetts in support of the proposition that the elements of a preference were to be determined as of the date of the execution of the unrecorded chattel mortgages rather than as of the date of the taking possession thereunder differ on their facts from the present case in a very material respect. In all of those cases the chattel mortgage either had been recorded or had been executed prior to the four months before bankruptcy.

Thus, in the leading case on this matter and one involving a Massachusetts transaction, the mortgage was executed about two years before bankruptcy.

Humphrey v. *Tatman,* 198 U.S. 91, 92.

In a second case the mortgage was executed about nine years before bankruptcy.

Thompson v. *Fairbanks,* 196 U.S. 516, 518.

In a third the security arrangement was entered into about four years before bankruptcy.

Sexton, Trustee, v. *Kessler & Company, Limited,* 225 U.S. 90, 96.

In the most recent case the conditional sales contract was recorded as required by statute.

Finance & Guaranty Company v. *Henry W. Oppenhimer,* 276 U.S. 10, 11.

Thus none of the prior cases before this Court involved a situation where both the execution of the unrecorded chattel mortgage and the taking possession thereunder occurred within the four months prior to bankruptcy.

II.

THE PRIOR CASES BEFORE THIS COURT CITED BY THE SUPREME JUDICIAL COURT OF MASSACHUSETTS IN SUPPORT OF ITS CONCLUSION ON THE ISSUE RAISED HEREIN WERE BASED ON THE FEDERAL BANKRUPTCY ACT AS IT EXISTED PRIOR TO THE AMENDMENT OF 1910, AND THEREFORE, ON THE DECIDED CASES, THE CASE CAN BE DECIDED IN FAVOR OF THE PETITIONER.

It is further significant to note that, in the prior cases of the taking possession under unrecorded chattel mortgages,

this Court was dealing with the bankruptcy act prior to the amendments of 1903 and 1910.

Cf. *Humphrey* v. *Tatman* (*supra*).
Thompson v. *Fairbanks* (*supra*).
Sexton, Trustee, v. *Kessler & Company, Limited* (*supra*).

Whatever may have been the law under the original Act of 1898, the effect of the amendment of 1910 should be authoritatively determined by this Court.

The amendment of 1903 (Act of February 5, 1903, c. 487, sec. 13, U.S. Sts. at Large, part 1, p. 799) to the bankruptcy act, 11 U.S.C. sec. 96, sub. (a), provided:

> "Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required."

The effect of this amendment, according to the decided cases, was merely to extend the four months' period during which the transfer was to be subject to attack rather than to set a date as of which the elements of a voidable preference were to be determined. Although many lower courts held this point of view, the Supreme Court did not decide the point, as the case raising it was disposed of on other grounds.

Page v. *Rogers,* 211 U.S. 575.

Remington had a different view of the effect of the amendment:

> "After the Amendment of 1903 it would have seemed on principle that since the Amendment made the four months an essential element of the very definition of a

preference itself, the date of the recording or filing ought to have been taken as being the date of the consummation of the transfer so far as creditors in bankruptcy were concerned, and to such effect were some of the decisions after that Amendment, even before the further Amendment of 1910."

4 Remington on Bankruptcy, sec. 1790, at pp. 744-745.

Cf. *English* v. *Ross*, 140 Fed. 630.

The Act of June 25, 1910, c. 412, sec. 11, 36 U.S. Sts. at Large, part 1, p. 842, made a radical change in 11 U.S.C. sec. 96, sub. (b), and provided that, if the stated elements of a preference were present "at the time of the . . . recording or registering of the transfer if by law recording or registering thereof is required," such transfer is voidable.

The effect of this amendment of 1910 to 11 U.S.C. sec. 96, sub. (b), is to make "the date of the recording, where recording is required under State law, the date at which the trustee is to prove the existence of all the elements of a preference . . . truly the right date, for . . . it is the present insolvent fund with which creditors are concerned, not the debtor's estate in the condition which might have existed several years beforehand."

4 Remington on Bankruptcy, sec. 1791, at pp. 756-757.

Explaining the time of transfer, Remington states:

"There are, in reality, two times of transfer in such cases. As between the transferer and transferee, obviously the time of the transfer is the time of the original execution and delivery of the instrument to the grantee

or transferee, regardless of its registration; but as to creditors, or the rest of the outer world, the 'transfer' is, by the policy of the State recording statutes not a complete 'transfer' at all until recorded, until delivery to the public recorder—then, and not until then, the creditor signifying to outside parties, to all others who might become interested in his assets, the effectual separation of the liened property from the rest of the debtor's assets. This, it must be conceded, is the basic principle upon which rest the recording statutes of the different States. It is also the basic principle of the right to legislate against secret liens. Likewise in a rightly construed bankruptcy preference statute, the great object should be to make clear that the 'transfer' so far as outside parties becoming interested in the estate are concerned, is not complete or perhaps is not even to be considered a 'transfer' at all, in cases where State laws require recording as against creditors, until delivery of the instrument to the recorder for registration."

4 Remington on Bankruptcy, sec. 1791, at pp. 756-757.

Thus it is clear that the policy behind the amendment of 1910 was to strike down secret liens by compelling a separation of the property covered by the lien by means of public recording.

The importance of this change in the bankruptcy laws is simply this: Under the act as it existed at the time the Supreme Court decided the prior cases of the taking possession under an unrecorded mortgage, if the mortgagee had recorded rather than taken possession he would have defeated the trustee. Since these cases the amendment of 1910 compels the contrary result and protects the trustee where there

is recording and the amendment is applicable. The situation where possession is taken under an unrecorded chattel mortgage is not expressly covered by the terms of the bankruptcy act as it existed at the time of the taking possession in the present case.

III.

IN VIEW OF THE POLICY BEHIND THE PROVISIONS OF THE BANKRUPTCY ACT AS EVIDENCED BY THE TREND OF AMENDMENTS THERETO AND THE DICTATES OF SOUND POLICY, THE CASE SHOULD BE DECIDED IN FAVOR OF THE PETITIONER AND THE SECRET LIEN IN THE FORM OF AN UNRECORDED CHATTEL MORTGAGE DECLARED A VOIDABLE PREFERENCE.

It is submitted that the trend of the legislative amendments to 11 U.S.C. sec. 96 indicates a policy against secret liens and that these amendments should receive such construction as will effectively make this possible.

Clearly, under the bankruptcy act as amended in 1910, if the respondents here had recorded their chattel mortgages on the date on which they took possession thereunder, the elements of a preference would be determined as of this later date. Such being the case, is it proposed that the respondents shall defeat the trustee by virtue of their fault in not complying with the recording requirements? The logical answer, in view of the policy against secret liens and the fact that all the dangers of defeating the just claims of creditors in bankruptcy are fully as extensively and fully as sinisterly present where possession is taken under the unrecorded chattel mortgage as where the mortgage is recorded, is that the amendment of 1910, by implication, was meant to make the date of taking possession the date as of which the elements of a preference are to be determined, where such possession is taken under an unrecorded chattel mortgage and where the applicable law required recording. Certainly this

should be the result where, as here, both the execution of the mortgage and the taking possession thereunder occurred within the four months prior to bankruptcy.

Conclusion.

It is therefore respectfully submitted that the decision of the Supreme Judicial Court in reversing the judgment of the Superior Court was unsound on an important question of law and the issue involved should be determined by this Court.

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JOHN WYLDE *et al.*,
Respondents.

BRIEF FOR THE RESPONDENTS.

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BRIEF FOR THE RESPONDENTS.

Summary and Short Statement of Matter Involved.

This was an action of "contract or tort" commenced by the petitioner, hereinafter called the plaintiff, by writ dated April 15, 1933, returnable to the Superior Court for Worcester County, Massachusetts. The plaintiff's declaration charged:

> "Count 1. The plaintiff is trustee in bankruptcy of Worcester Motor Co., Inc., and authorized to sue. The defendants converted to their own use the property of Worcester Motor Co., Inc., to wit, sixteen automobiles of the value of $5000.
>
> "Count 2. The plaintiff is trustee in bankruptcy of Worcester Motor Co., Inc., and authorized to sue. The

defendants being creditors of the Worcester Motor Co., Inc., did receive property of the Worcester Motor Co., Inc., to the value of $5000 within four months of the petition in bankruptcy being filed by the Worcester Motor Co. Inc., and that the defendants or their agents had reasonable cause to believe that Worcester Motor Co., Inc. was insolvent; that the giving and receiving of the property as herein stated created a preference in their behalf as against the other creditors of the bankrupt wherein they received a greater percentage than the other creditors of the same class.

"Count 3. The plaintiff is trustee in bankruptcy of Worcester Motor Co., Inc., and authorized to sue. The defendants in violation of the National Bankruptcy Act did receive goods of the bankrupt to the value of $5000 with intent to hinder and delay the other creditors.

"Count 4. The plaintiff is trustee in bankruptcy of Worcester Motor Co., Inc., and authorized to sue. The defendants owe him $4000 for moneys had and received.

"All counts for one and same cause of action."

The defendants' answer was a general denial. The case was referred to an Auditor who found for the defendants.

It was tried in the Superior Court on January 14, 1936, no evidence other than the Auditor's Report (Record, pp. 1-11) being introduced. On April 1, 1936 the Superior Court made a finding and order for judgment for the plaintiff. The defendants alleged exceptions which were sustained by the Supreme Judicial Court and judgment ordered for the defendants, which was entered in the Superior Court on March 17, 1941. On June 16, 1941 this petition for certiorari was filed. The facts as established by the Auditor's Report (Record, pp. 1-11) were as follows:

The petitioner is trustee in bankruptcy of Worcester Motor Co. Inc. which was adjudicated a bankrupt on August 5, 1932. The Worcester Motor Co. Inc. was en-

gaged in the business of buying, selling and dealing in motor vehicles until August 1, 1932, making use of moneys advanced by the defendants upon the security of the motor vehicles purchased, evidenced by written contracts called trust receipts in the form shown by Exhibit "A" attached to the Auditor's Report (Record, p. 6). The amounts so advanced amounted to approximately $100,000 in 1931 and approximately $50,000 in the first seven months of 1932. All moneys were advanced against security given by Worcester Motor Co. Inc. to the defendants co-incident with such advancements. Each contract or trust receipt stated that Worcester Motor Co. Inc. had received from Patterson, Wylde & Windeler, the owner thereof, a certain motor vehicle purchased under credit opened by them for its account, in consideration whereof it agreed to hold said motor vehicle in trust for the defendants as their property, and to return the same on demand, but with liberty to exhibit and only with the written consent of the defendants first obtained to sell the same for their account for cash for not less than the stated amount, and in case of sale to keep the proceeds separate from its funds and immediately hand them to the defendants. The defendants had the right to cancel the trust at any time and repossess the motor vehicle.

On July 22, 1932, trust receipts covering eleven used cars valued at $1,396.00 were substituted for trust receipts covering four new cars, which the Worcester Motor Co. Inc. had sold or contracted to sell, a part of the proceeds of those sales then being in the possession of Worcester Motor Co. Inc. and a part of the money so received having been expended by it in the usual course of its business. The defendants received and accepted the eleven used cars as security for the amounts advanced against the four motor

vehicles described in the trust receipts for which they were exchanged. The defendants then held similar trust receipts covering five new cars amounting to $2,270.00 which, with the eleven used cars, remained in the possession of Worcester Motor Co. Inc. until about August 1, 1932 when the eleven used cars and the five new cars were repossessed by the defendants and thereafter sold, the used cars for $1,396.00 and the new cars for $2,270.00, which was a reasonable price, and the defendants did not receive any sums in excess of the amounts due them under said trust receipts. The defendants acted in good faith and within the powers set forth in the trust receipts.

None of the trust receipts were recorded. They were valid as between the parties thereto, and no creditor or third person had acquired any rights in the motor vehicles before the defendants perfected their title by repossession. At the time of repossession Worcester Motor Co. Inc. was insolvent to the knowledge of the defendants, but it was solvent when the title to the motor vehicles was transferred to the defendants under the trust receipts, and there was no evidence of insolvency prior to the date of repossession, or that there were any other creditors of the same class. Each trust receipt was given as security for the purchase price of the motor vehicle which was bought with the money advanced by the defendants, and the assets of the company were not depleted by the giving of these trust receipts. Nothing was taken away from the creditors.

At the trial the defendants requested rulings that upon the pleadings and the evidence the plaintiff was not entitled to recover upon any count of his declaration. In sustaining the exceptions of the defendants to the finding and rulings of the trial court and ordering the entry of judgment for the defendants, the Supreme Judicial Court of Massachusetts held that the evidence did not sustain any count of the plaintiff's declaration.

Question Presented.

In the absence of any clear specification of errors alleged, the question seems to be whether one who advanced money to a solvent merchant in good faith, but within four months prior to bankruptcy, upon the security of the transfer of title to the merchandise purchased with that money, evidenced by trust receipts which are valid between the parties thereto under Massachusetts law although not recorded under the applicable chattel mortgage law, is guilty of a fraudulent preference if he perfects his title to his security by lawful foreclosure after the merchant becomes insolvent, but before any bankruptcy petition is filed or third persons acquire any rights in the merchandise.

In view of the averment on page 5 of the petition for certiorari that the recording of a chattel mortgage is required under Massachsetts law by the Bankruptcy Act, and the absence of any statement that under Massachusetts law an unrecorded chattel mortgage is valid as between the parties thereto, and if foreclosed before any creditor fixes a lien by attachment or taking on execution the title of the mortgagee is perfected and relates back to the time of the execution of the chattel mortgage, it becomes necessary to consider just what the Supreme Judicial Court actually decided, which was,—

That the so-called trust receipts were valid as between the parties thereto—Worcester Motor Co. Inc. and the defendants—from the time they were executed; that they were security instruments by which title to the automobiles passed to the defendants for security only, and were in substance chattel mortgages and were governed by the law applicable to chattel mortgages; that possession of the automobiles was taken by the defendants before the date of bankruptcy in accordance with the terms of the trust re-

ceipts, so that thereafter the automobiles were not held by the defendants as security, but the absolute property therein was in the defendants prior to the date of bankruptcy; that the title of the defendants to the automobiles was perfected by the defendants by their taking possession of the automobiles for foreclosure according to the terms of the trust receipts before date of bankruptcy; that the fact that the trust receipts were not recorded did not prevent the defendants from acquiring title to the automobiles thereunder prior to the date of bankruptcy as against the company if no rights of other persons had intervened, and that no rights of other persons had intervened.

That there was no conveyance of the automobiles to the defendants in fraud of creditors according to the principles of State law governing fraudulent conveyances, and no transfer made within four months prior to the date of bankruptcy which was void under U. S. C. Title 11, Section 107 (E), either because made with the intent and purpose on the part of the company to hinder, delay or defraud creditors, or because constituting a conveyance, transfer or encumbrance made by the company while insolvent, or which was voidable by the trustee under U. S. C. Title 11, Section 96 (B) because made within four months before the date of bankruptcy when the company was insolvent.

That on the facts found there was no conveyance of the automobiles to the defendants in fraud of creditors; that there was no intent to hinder, delay or defraud either present or future creditors; that each trust receipt was given as security for the purchase price of an automobile; that the assets of the company were not depleted by the giving of these trust receipts; that they took nothing away from the creditors; that the trust receipts relating to the eleven used automobiles were given in substitution for the original trust receipts for four new automobiles as security

for the original obligations, and that no agreement or understanding to withhold the trust receipts from record is shown.

That the defendants were purchasers in good faith and for a present fair consideration; that the time of the transfer by the law of the Commonwealth is the time of the giving of the security instrument valid between the parties thereto, in pursuance of which possession of the property is taken for foreclosure.

That the Worcester Motor Co. Inc. was not insolvent at the time it executed the trust receipts, and the defendants did not have reasonable cause to believe that the company was insolvent.

Established Facts.

The following facts, which negative any claim of a voidable preference, are established by the evidence:

1. The Worcester Motor Co. Inc. was not insolvent at the time it made a transfer of the motor vehicles to the defendants.

2. The defendants did not have any reasonable cause to believe that Worcester Motor Co. Inc. was insolvent at the time of the transfers.

3. The transfers of the motor vehicles were made for a present fair consideration.

4. The estate of Worcester Motor Co. Inc. was not depleted by the transfers of the motor vehicles which were bought at the time of transfer with the moneys advanced by the defendants.

5. The transfer of title to the motor vehicles by the execution and delivery of the trust receipts, followed by possession taken by the defendants in accordance with the provisions of the trust receipts and before bankruptcy, was

not null and void under the laws of Massachusetts as against creditors of the company, but was complete, lawful and effective.

6. The trust receipts were unquestionably valid under the laws of Massachusetts.

7. No rights of third persons were involved, and the trust receipts were not required to be recorded by the laws of Massachusetts to be valid between the parties thereto.

The recording statute is as follows:

General Laws of Massachusetts, Chapter 255, Section 1.

Mortgages of personal property shall, within fifteen days from the date written in the mortgage, be recorded on the records of the town where the mortgagor resides when the mortgage is made, and on the records of the town where he then principally transacts his business. If the mortgagor resides out of the commonwealth, and the property mortgaged is within the commonwealth when the mortgage is made, the mortgage shall be recorded on the records of the town where the property then is. If a record in two different places is required and the mortgage is recorded in one within said fifteen days, it may be recorded in the other within ten days after the date of the first record. The mortgage shall not be valid against a person other than the parties thereto until so recorded; and a record made subsequently to the time limited shall be void. This section shall apply to bills of sale given for security, but shall not apply to assignments which transfer the title of a lessor or conditional vendor to a lease or other instrument containing a conditional sale agreement and to the personal property therein described. If the condition for redemption of the property included in such bill of sale is in writing, it shall be recorded with and as a part of the bill of sale; if the

condition for redemption is oral, a written statement of such condition signed by the mortgagee shall be so recorded.

Summary of the Argument.

1. There was no preference under the Federal Bankruptcy Act.
2. State or local law is decisive of the validity and legal effect of the trust receipts.
3. Under Massachusetts law the defendants had good title to the motor vehicles.
4. Conclusion.

Argument.

I.

THERE WAS NO PREFERENCE UNDER THE FEDERAL BANKRUPTCY ACT.

The record shows that Worcester Motor Co. Inc. was not insolvent at the time it transferred the motor vehicles to the defendants.

The insolvency of the debtor at the time of the challenged payment or transfer is an essential element of a voidable preference.

8 Corpus Juris Secundum 700.
Kaufman vs. Tredway, 195 U. S. 271.
Brislin vs. Killanna Holding Corp., 85 Fed. 2nd 667.
Ely vs. Greenbaum, 85 Fed. 2nd 501.
Doggett vs. Chelsea Trust Co., 73 Fed. 2nd 614.
Charlesworth vs. Hipsch Inc., 84 Fed. 2nd 834.
Certiorari Denied.

The test of insolvency as an element of a voidable preference is whether or not the property and assets of the debtor at a fair valuation are sufficient in amount to pay his debts.

8 Corpus Juris Secundum 701, 777, 831.

There was a present adequate and fair consideration paid when each trust receipt was executed. Security taken for bona fide cash advances to the bankrupt, even when he is insolvent, does not constitute a preference. There was no fraud or collusion. The defendants acted in good faith and within the powers given them under the trust receipts. The estate of Worcester Motor Co. Inc. was not diminished.

Humphrey vs. Tatman, 198 U. S. 91.
Thompson vs. Fairbanks, 196 U. S. 516.
Kaufman vs. Tredway, 195 U. S. 271.
N. Y. County National Bank vs. Massey, 192 U. S. 138.
Newport Bank vs. Herkimer Bank, 225 U. S. 178.
Sexton vs. Kessler & Co. Inc., 225 U. S. 90, 97.
Finance & Guaranty Co. vs. Oppenheimer, 276 U. S. 10, 12.
Taney vs. Penn. National Bank, 232 U. S. 174.
Bailey vs. Baker Ice Machine Co., 239 U. S. 268.
Lindley vs. Ross, 200 Fed. 733.
Coffey vs. Managed Properties, 85 Fed. 2nd 88.
Green vs. First Savings & Trust Co. of Tampa, 36 Fed. 2nd 680.
Morrison vs. Bay Parkway National Bank, 60 Fed. 2nd 41.
Beacon Trust Co. vs. Dolan, 27 Fed. 2nd 247.
Brown Shoe Co. vs. Carns, 65 Fed. 2nd 294.
Irving Trust Co. vs. Bank of America Natl. Assn., 68 Fed. 2nd 887.

First National Bank vs. Live Stock National Bank, 31 Fed. 2nd 416.
First National Bank of Pedricktown vs. Waddington, 51 Fed. 2nd 1052.
Doggett vs. Chelsea Trust Co., 73 Fed. 2nd 614.
Richardson vs. Germania Bank of City of N. Y., 263 Fed. 320.
Certiorari Denied, 252 U. S. 582.

No creditor of a bankrupt can demand that the estate of the bankrupt be augmented by the application to the general estate of the bankrupt of property which never rightfully belonged to the bankrupt.

Gorman vs. Littlefield, 229 U. S. 19.

The giving of security for a present loan does not effect a preference.

Dean vs. Davis, 242 U. S. 438.
N. Y. County National Bank vs. Massey, 192 U. S. 138.
Newport Bank vs. Herkimer Bank, 225 U. S. 178.
First National Bank vs. Live Stock Natl. Bank, 31 Fed. 2nd 416.
Beacon Trust Co. vs. Dolan, 27 Fed. 2nd 247.
Doggett vs. Chelsea Trust Co., 73 Fed. 2nd 614.
First National Bank vs. Waddington, 51 Fed. 2nd 1052.
Certiorari Denied, *Waddington vs. Pedrick,* 284 U. S. 678.

The rights of the trustee in bankruptcy are no greater than those of Worcester Motor Co. Inc. at the time of adjudication.

Security Warehousing Co. vs. Hand, 206 U. S. 415.
Bailey vs. Baker Ice Machine Co., 239 U. S. 268.
York Manufacturing Co. vs. Cassell, 201 U. S. 344.
Bryant vs. Swofford Bros., 214 U. S. 279.

The enforcement or satisfaction of a valid existing lien or security does not in general effect a voidable preference.

Humphrey vs. Tatman, 198 U. S. 91.
Thompson vs. Fairbanks, 196 U. S. 516.
Johnson vs. Root Mfg. Co., 241 U. S. 160.
Irving Trust Co. vs. Bank of America Natl. Assn., 68 Fed. 2nd 887.
Certiorari Denied, 292 U. S. 628.

Taking possession before bankruptcy of property covered by a valid chattel mortgage by the mortgagee for the purpose of perfecting his lien is not a preferential transfer.

Sexton vs. Kessler & Co. Inc., 225 U. S. 90.
Thompson vs. Fairbanks, 196 U. S. 516.
Fairbanks Shovel Co. vs. Wills, 240 U. S. 642.
Hurley vs. Atcheson, Topeka & Santa Fe Rwy., 213 U. S. 126.
Dale vs. Pattison, 234 U. S. 399.
In re: Hurley, 185 Fed. 851.
In re: Schilling, 251 Fed. 972.
In re: East End Mantle & Tile Co., 202 Fed. 275.
In re: Howard, 207 Fed. 402.
In re: Social Circle Cotton Mills, 213 Fed. 994.

II.

STATE OR LOCAL LAW IS DECISIVE OF THE VALIDITY AND LEGAL EFFECT OF THE TRUST RECEIPTS.

Whether or not the trust receipts or chattel mortgages must be recorded in order to be valid between the parties thereto under the provisions of Section 60 of the Bankruptcy Act depends upon the applicable State or local law.

8 Corpus Juris Secundum 737.
Martin vs. Commercial Natl. Bank of Macon, Ga., 245 U. S. 513.
Carey vs. Donohoe, 240 U. S. 430.
Hartford Accident & Indemnity Co. vs. Coggin, 78 Fed. 2nd 471, Certiorari Denied, 296 U. S. 620, Rehearing Denied, 296 U. S. 663.

The legal effect of the transaction depends upon the local law.

Taney vs. Penn Bank, 232 U. S. 174.
Thompson vs. Fairbanks, 196 U. S. 516.
Humphrey vs. Tatman, 198 U. S. 91.
York Mfg. Co. vs. Cassel, 201 U. S. 344.
Hiscock vs. Varick Bank, 206 U. S. 28.
Security Warehousing Co. vs. Hand, 206 U. S. 415.
Bryant vs. Swofford Bros., 214 U. S. 279.
Holt vs. Crucible Steel Co., 224 U. S. 262.
Dooley vs. Pease, 180 U. S. 126.
Dale vs. Pattison, 234 U. S. 399.
In re: Harvey, 212 Fed. 340.

III.

Under Massachusetts Law the Defendants Had Good Title to the Motor Vehicles.

The transfer of the motor vehicles to the defendants by means of the trust receipts executed by the Worcester Motor Co. Inc. was valid under State law. Trust receipts are governed by the same rules as chattel mortgages. They are valid as between the parties thereto whether recorded or not. Upon repossession before bankruptcy and before any third persons had intervened the defendants perfected their title. They acted in good faith and did not receive any more than was due them. The estate of Worcester Motor Co. Inc. was not diminished by the defendants. The motor vehicles were purchased with their money; the invoices with the trust receipts given them. The transfer was thus made for a present and adequate consideration and at a time when the Worcester Motor Co. Inc. was solvent.

Mason vs. Wylde, 1941 Mass. Advance Sheets 367.

It is the settled law of this Commonwealth that an instrument of transfer of personal property absolute in form, but intended by the parties to be a mortgage, genuine, honest and valid as such when executed and delivered, authorizes the person named as vendee to take possession of the property in order to secure his own debt at any time before the rights of other persons have intervened, and that thereby he acquires a title which relates back for its validity to the date of the instrument, and that although the taking possession may be at a time when the debtor is insolvent to the knowledge of himself and of his creditor named as vendee in the instrument of transfer, it is, never-

theless, effectual although occurring within a period of time previous to insolvency which would vitiate the transaction if the initial step had occurred at the time of taking possession.

Coggan vs. Ward, 215 Mass. 13.

There is no question that a chattel mortgage is valid between the parties though not recorded.

Dale vs. Pattison, 234 U. S. 399.
McGlue vs. Loudon, 251 Mass. 173.
Arnold vs. Chandler Motors, 244 Mass. 210.
Atlantic Transportation Co. vs. Alexander Shipping Co., 261 Mass. 1.
Carey vs. Donohue, 240 U. S. 430.
Martin vs. Commercial National Bank, 245 U. S. 513.
Hartford Accident & Indemnity Co. vs. Coggin, 78 Fed. 2nd 471.

The omission to record the trust receipts did not affect their validity or limit the rights of the defendants. It is conclusively shown that they were valid as between the parties—the Worcester Motor Co. Inc. and the defendants. No creditor acquired a lien upon the property. The title of the defendants was perfected when they terminated the trust and took possession of the motor vehicles. After repossession they held the cars as their own property, not as security for debt.

Humphrey vs. Tatman, 198 U. S. 91.
Fairbanks Shovel Co. vs. Wills, 240 U. S. 642.
Thompson vs. Fairbanks, 196 U. S. 517.
Security Warehousing Co. vs. Hand, 206 U. S. 415.
Taney vs. Penn National Bank, 232 U. S. 174.

Finance & Guaranty Co. vs. Oppenheimer, 276 U. S. 10.
In re: Schilling, 251 Fed. 972.
Blanchard vs. Cooke, 144 Mass. 207, 223.
Cottrell vs. Carter Rice & Co., 173 Mass. 155.
Wasserman vs. McDonnell, 190 Mass. 326.
Arnold vs. Chandler Motors, 244 Mass. 210.
Mulloney vs. Black, 244 Mass. 391.
Vorenberg vs. American House Hotel Co., 246 Mass. 108.
Alexander vs. F. L. Smithe Machine Co., 248 Mass. 436.
McGlue vs. Loudon, 251 Mass. 173.
Atlantic Transportation Co. vs. Alexander Shipping Co., 261 Mass. 1.
Hanford vs. Codman, 266 Mass. 93.
Ferguson vs. Winchester Trust Co., 267 Mass. 397.
Harris vs. Flynn, 272 Mass. 8, 14.
Mason vs. Wylde, 1941 Mass. Advance Sheets 367.
Bennett vs. Bailey, 150 Mass. 257.
Oshry vs. Haddad, 265 Mass. 199.
Comparone vs. M. J. Kaplan Co. Inc., 270 Mass. 74.
Baker vs. Chisholm, 268 Mass. 1.
Williams vs. Whitinsville Savings Bank, 283 Mass. 297.

The defendants acted in good faith. There was no fraud. They advanced money to the Worcester Motor Co. Inc. to enable it to purchase motor vehicles. There was no preference. Worcester Motor Co. Inc. was then solvent. The defendants perfected their title by repossession before bankruptcy and before any third persons intervened. They received no more than was justly due them.

At the time of the bankruptcy Worcester Motor Co. Inc. did not own the motor vehicles, and the trustee in bankruptcy is vested with no better right or title than the bankrupt had when the trustee's title accrued.

Bailey vs. Baker Ice Machine Co., 239 U. S. 628.
York Mfg. Co. vs. Cassel, 201 U. S. 344.
Bryant vs. Swofford Bros., 214 U. S. 279.
Kaufman vs. Tredway, 195 U. S. 271.
Sexton vs. Kessler & Co. Inc., 225 U. S. 90.
Newport Bank vs. Herkimer Bank, 225 U. S. 178.
Dean vs. Davis, 242 U. S. 438.
N. Y. County National Bank vs. Massey, 192 U. S. 138.
Ely vs. Greenbaum, 85 Fed. 2nd 501.
Coffey vs. Managed Properties, 85 Fed. 2nd 87.
Charlesworth vs. Hipsch, Inc., 84 Fed. 2nd 834.
Brislin vs. Killanna Holding Corp., 85 Fed. 2nd 667.
Dickinson vs. Central National Bank, 129 Mass. 279.
Carr vs. Briggs, 156 Mass. 78.
Lyon vs. Wallace, 221 Mass. 351.
Cohen vs. Levy, 221 Mass. 336.
Jump vs. Bernier, 221 Mass. 241.
Putnam vs. U. S. Trust Co., 223 Mass. 199.
O'Connell vs. Worcester, 225 Mass. 159.
Brickley vs. Wrenn, 252 Mass. 16.
Samuels vs. C. E. Fogg Co., 258 Mass. 402.
Banca Italiana vs. Bailey, 260 Mass. 151.
Comparone vs. M. J. Kaplan Co. Inc., 270 Mass. 74.
Shay vs. Gagne, 275 Mass. 386.
Barishefsky vs. Cohen, 299 Mass. 360.
Kerrigan vs. Fortunato, 304 Mass. 617.
Mason vs. Wylde, 1941 Mass. Advance Sheets 367.

Worcester Motor Co. Inc. was bailee of certain motor vehicles, the title to which was in the defendants. It agreed to hold the motor vehicles in trust for the defendants, to preserve the defendants' title intact, and to return them to the defendants on demand. The defendants had the right to terminate the bailment at any time.

A party holding security does not create a preference by taking possession under it within four months if he lawfully may under the law of the State.

Finance & Guaranty Co. vs. Oppenheimer, 276 U. S. 10, 12.

IV.

Conclusion.

The suggestion that the Bankruptcy Act and the State recording statutes, declaring valid as between the parties thereto an unrecorded chattel mortgage given by a solvent debtor for a fair, adequate and present consideration within four months prior to bankruptcy and foreclosed before any rights of third persons have intervened and before bankruptcy, may defeat the just claims of creditors and permit an unknown creditor to spring up just prior to bankruptcy armed with a hidden chattel mortgage and seize the very property which formed the basis for the creditor's lending money to the now bankrupt debtor, is purely gratuitous and wholly unsupported by the law or facts of the case at bar. The petitioner failed to prove his charges of conversion, preference, intent to hinder and delay, and moneys had and received.

The respondents respectfully ask that the petition for a writ of certiorari be denied.

Respectfully submitted,

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